

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by Jayne B.
Khalifa, Acting Commissioner,
Department of Human Rights,

Complainant,

ORDER

vs.

Russell Dieter Enterprises, Inc.,
d/b/a Montevideo Variety, Inc.
and Ben Franklin Variety Store,

Respondent.

On May 20, 1987, Administrative Law Judge Peter C. Erickson issued an Order denying Respondent's Motion for Summary Judgment which had been filed on March 6, 1987. Subsequent to the issuance of that Order, the Judge became aware of a case which was not addressed in the briefs on the Motion and which may be controlling. See, Carlson v. ISD 623, 392 N.W.2d 216 (Minn. 1986). The Judge permitted both parties to file additional argument concerning the applicability of the Carlson case herein.

Appearing on behalf of the Complainant was Carl M. Warren, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101. Appearing on behalf of the Respondent was Robert S. Halagan, from the firm of Felhaber, Larson, Fenlon and Vogt, Attorneys at Law, 1935 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, Minnesota 55402. The final submission was filed on July 8, 1987.

NOTICE

Pursuant to Minn. Stat. 363.071, subd, 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUE

The issue presented for determination is whether the Charging Party's failure to file a verified charge of discrimination within six months requires dismissal pursuant to Minn. Stat. 363.06, subds. I and 3 (1982).

Based upon all of the records, files and arguments of counsel, the Administrative Law Judge makes the following:

ORDER

Respondent's Motion for Summary Judgment is Granted.

Dated this 24 day of July, 1987.

PETER C. ERICKSON
Administrative Law Judge

MEMORANDUM

The affidavits and documentation submitted by the parties regarding this Motion show the following procedural history:

1. On July 16, 1983 an incident occurred at the Charging Party's place of employment which led to a reduction in her hours and resignation from her job which occurred on July 18 or 19, 1983.

2. On January 4, 1984, the Department of Human Rights received a letter dated December 30, 1983 from Thomas G. Johnson, an attorney who was representing the Charging Party, concerning alleged acts of sexual harassment and assault. This letter stated the name of the Charging Party, Linda Christenson, the name of the offending employer, the Ben Franklin Store in Montevideo, and the nature of the alleged discrimination, acts of sexual harassment. The letter further stated that it was intended to be a ''claim'' filed with the Department of Human Rights.

3. On or about January 17, 1984, Linda Christenson filed an "employment questionnaire" with the Department concerning the alleged sexual harassment. This questionnaire named the Ben Franklin Store in Montevideo as the employer.

4. On March 14, 1984, the Department of Human Rights received a verified charge of discrimination from Linda Christenson. This charge named the Ben Frnaklin Store as the Respondent.

5. On April 4, 1984, the Department of Human Rights served notice on the Ben Franklin Store in Montevideo that a charge of discrimination had been filed. That notice was received by an authorized agent of the Ben Franklin Store, Lucille Nelson, on April 7, 1984.

6. On April 24, 1984, the Department of Human Rights was advised by Respondent's attorney, Joe L. Maynes, that the appropriate entity to be named as the Respondent was Montevideo Variety, Inc. That named entity was identified as the Respondent in this action in subsequent correspondence from the Department beginning on February 27, 1985.

7. The initial Complaint in this action, dated December 19, 1986, identifies Russell Deiter Enterprises, Inc., d/b/a Montevideo Variety, Inc. and Ben Franklin Variety Store, as the Respondents in this action.

8. Montevideo Variety, Inc. did not register with the Minnesota Secretary of State's Office to do business in the State of Minnesota until March 11, 1987.

Respondent contends that the holding in Carlson, supra, compels that this matter be dismissed.

The Carlson case involved an attempt by a class of teachers to intervene in a Chapter 363 district court action and name as defendants school districts against which no individual charge had been filed with the Department of Human Rights. The Minnesota Supreme Court affirmed the trial court's dismissal of sex discrimination actions of intervenors who had not filed a charge with the Department of Human Rights within the applicable time period. The court specifically held that the "six-months' filing time limit in Minn. Stat. 363.06, subd. 3 (1976), was jurisdictional." Carlson at 224. Additionally, the court rejected federal case law which allows an equitable tolling of the filing limitation. Carlson at 221-22. The basis of the Court of Appeals' decision, Carlson v. Independent School District No. 283, 370 N.W.2d 51 (Minn. App. 1985), was that the six-month filing requirement was a statute of limitations which could be tolled from the time of filing the original Complaint until a court decision was issued on the class certification motion. The Supreme Court rejected the statute of limitations-tolling analysis but stated that its holding only applied to claims arising under the Human Rights Act before the 1981 amendments which permit claimants to file suits directly in state district court. Carlson at 220.'

The issues in this case are: (a) whether the "restrictive" holding in Carlson is applicable herein; and (b) whether the lack of verification of a charge is a jurisdictional defect.

The Judge has concluded that the Carlson holding is applicable to the case herein, even though the Supreme Court stated that the case was restricted to claims arising under Chapter 363 before the 1981 amendments. The Carlson case was an appeal from a district court action. Prior to 1981, Chapter 363 did not permit an initial action in district court to determine allegations of discrimination. An initial filing with the Department of Human Rights was required. In 1981, the Legislature amended Chapter 363 to permit a direct filing in district court. Minn. Stat. 363.06, subd. 1 (1982). Because Carlson arose from a district court action, it was logical for the Supreme Court to restrict the effect of its decision to cases which could not have been initially brought in district court. This distinction has no bearing on the case herein.

The applicable provisions of Chapter 363 read as follows:

363.06 GRIEVANCES.

Subdivision 1. Charge filing. Any person aggrieved by a violation of this chapter may bring a civil action as

'The Minnesota legislature did amend section 363.06, subd. 3 to transform it into a statute of limitations. See, Minn. Stat. 363.06, subd. 3 (1984). However, the amendment occurred after the cause of action herein arose.

provided in section 363.14, subdivision 1, clause (a), or may file a verified charge with the commissioner or his designated agent, stating the name and address of the person alleged to have committed an unfair discriminatory practice, setting out the details of the practice complained of and, if applicable, providing witnesses, documents, and any other information required by the commissioner

Subd. 3. Time for filing claim. A claim of an unfair discriminatory practice must be brought as a civil action pursuant to section 363.14, subdivision 1, clause (a), or filed in a charge with the commissioner within six months after the occurrence of the practice. (Emphasis added.)

As set forth above, subdivision 1 states clearly that a "verified" charge is to be filed with the Commissioner. Subdivision 3 merely states that a charge must be filed within six months. The Judge has already determined in the Order issued on May 20, 1987 that the letter filed by Mr. Johnson, the Charging Party's attorney, constituted a charge with the exception of a verification. The issue thus presented is whether the "verification" is such a critical element to a charge that the lack of it within the jurisdictional time period requires dismissal; or whether the lack of a verification is merely a technical defect which may be corrected after the jurisdictional time period has expired.'

One federal court has held that the verification requirement contained in Title VII of the Civil Rights Act of 1964 is jurisdictional and that the failure to verify the charge required its dismissal. *EEOC v. Appalachian Power Company*, 568 F.2d 354 (4th Cir. 1978) (a charge cannot be considered to be valid unless its underlying basis has been verified). Other federal courts have held that the failure to file a verified charge is not a jurisdictional defect but a technical defect curable by amendment.' See, e.g., *Price v. Southwestern Bell Telephone Company*, 687 F.2d 74, 78-79 (5th Cir. 1982); *Casavantes v. California State University, Sacramento*, 732 F.2d 1441

'The Office of Administrative Hearings issued a decision prior to *Carlson* which held that the filing of a charge which was not verified is not a jurisdictional defect. See, *State v. Eastern Airlines, Inc.*, HR-83-022-JL (Order issued August 31, 1983). This decision was affirmed by the Minnesota

Court of Appeals but the issue of verification was not discussed by the court. 346 N.W.2d 184 (Minn. App. 1984). The Carlson case requires a re-examination of this previous decision, however.

'Regulations promulgated to implement Title VII provided that technical defects, "including failure to verify the charge", could be cured by amendment

which would relate back to the date the charge was received. 29 C.F.R.

1601.12(b). This language does not appear in the Department of Human Rights

rules in effect during the relevant time period.

(9th Cir. 1984) (an unsigned and unverified intake questionnaire filled out by the charging party was sufficient to constitute a timely charge). The last two federal decisions were issued subsequent to the United States Supreme Court's decision in *Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S. Ct. 1127 (1982) which held that filing a timely charge of discrimination was not a jurisdictional requirement but was like a statute of limitations, subject to waiver, estoppel and equitable tolling. 455 U.S. at 393. As stated above, the *Zipes* analysis was specifically rejected by the Minnesota Supreme Court in *Carlson*.

The critical function of a verification requirement is to provide an indicia of validity and reliability for the facts contained in the charge. After a charge has been filed, the Department of Human Rights has a statutory obligation to serve the charge on the respondent within five days and promptly investigate the truth of the allegations contained in the charge. Minn. Stat.

363.06, subds. 1 and 4 (1982). Untimely service of the charge by the Department may result in a dismissal of the action. *State v. Eastern Airlines, Inc.*, supra.

The record in this case shows that neither the letter from the Charging Party's attorney nor the questionnaire she filled out were served on the Respondent. It was not until after a verified charge had been filed by the Charging Party that a copy of that charge was served on the Respondent. Obviously, the Department placed a great deal of importance on the fact that a verified charge had to be filed. Otherwise, a copy of the attorney's letter or the questionnaire form could have been served on the Respondent to comply with the statutory service requirement.

At the time the charge was filed by the Charging Party herein, the rules of the Minnesota Department of Human Rights provided that a charge could be amended, "to cure technical defects or omissions Minn. Rule 5000.0400,

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subp. 5 (1983 Edition) . The Judge concludes, however, that the verification of a charge is not a "technical defect" but rather, a vital element to the jurisdictional requirement that a charge be filed within six months. The filing of a verified charge triggers the statutory procedural steps that the Department of Human Rights must initiate immediately subsequent

4 The word "charge" is defined in Minn. Rule 5000.0100, subp. 7 (1983) as "a sworn written statement filed by a person Minn. Rule 5000.0400, subp. 2 (1983) states that:

Notwithstanding the provisions of part 5000.0100, subpart 7 and subpart 1 of this part, a charge is deemed filed when the department receives from a person making a charge a written statement sufficiently precise to identify the

parties and describe generally the action or practices
complained of.

However, this rule was amended subsequent to the issuance of Carlson to
require that a "verified charge" must be filed pursuant to Minn. Stat.

363.06, subd. 3. See, 11 S.R. 740 (October 27, 1986) compared with the
pre-Carlson proposed rule at 10 S.R. 2473 (June 9, 1986).

to the filing. It would not make sense to permit a "tolling" of the attestation of a charge while service on the respondent and the investigation were on hold.

The Judge, therefore, reads the word "verified" into subdivision 3 of Minn. Stat. 363.06 (1982). Subdivision 1 of that section, which sets forth the required contents of the charge, mandates that the charging party file a "verified charge". Consequently, the Judge has concluded that the lack of verification is a jurisdictional defect and that the Complaint herein must be dismissed.

P.C.E.